Supreme Court of the United States

OCTOBER TERM, 1942.

No. 659.

...RAL HANOVER BANK AND TRUST COM...

...GEORGE CHAW ATKINS and JOHN ...TON ATKINS, ...

...WILLIAM D. KELLY, ...

APPELLEE'S BRIEF

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 659.

CENTRAL HANOVER BANK AND TRUST COMPANY, a banking corporation of the State of New York, GEORGE CHEW ATKINS and JOHN NORTON ATKINS, as Executors under the last will and testament of GEORGE W. E. ATKINS, deceased, and GEORGE CHEW ATKINS and JOHN NORTON ATKINS, individually,

Appellants,

vs.

WILLIAM D. KELLY, State Tax Commissioner (Successor to J. H. Thayer Martin),

Appellee.

APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

APPELLEE'S BRIEF.

REFERENCE TO OFFICIAL REPORTS OF OPINIONS BELOW.

This case in the Courts of the State of New Jersey is cited *sub nom. Central Hanover Bank and Trust Company vs. Martin.* William D. Kelly was substituted for J. H. Thayer Martin as State Tax Commissioner by order entered

in the Court of Errors and Appeals (Record 68). The opinions of the State Courts are officially reported as follows:

Court of Errors and Appeals (Opinion by Heher, J., September 18, 1942—R. 66), 129 N. J. Law 127.

Supreme Court (*Per Curiam*, January 5, 1942—R. 62), 127 N. J. Law 468.

Prerogative Court (Opinion by Vice-Ordinary Buchanan, February 14, 1941—R. 28), 129 N. J. Eq. 186.

STATEMENT OF GROUNDS OF JURISDICTION.

This appeal is brought pursuant to the provisions of Title 28, sec. 344(a), United States Code—Judicial Code, sec. 237(a)—as amended, from a final judgment of the Court of Errors and Appeals (the highest court of the State of New Jersey in which a decision in this suit could be had) upholding the constitutionality of the New Jersey Inheritance Tax Law and an assessment of inheritance taxes thereunder. Said judgment was entered September 18, 1942 (R. 67), and application for order allowing appeal was presented and appeal allowed December 15, 1942 (R. 69, 77).

Motions to affirm or dismiss for want of a substantial federal question were denied and probable jurisdiction noted by order of February 15, 1943 (R. 80).

STATEMENT OF FACTS.

The facts material to a consideration of the issues raised on this appeal are adequately stated by appellants (their Brief, 2-5).

SPECIFICATION OF ERRORS

While four grounds have been assigned by appellants for the reversal of the judgment appealed from (R. 74) the substance thereof, concisely stated, is that the New Jersey Inheritance Tax Law and the assessment thereunder are repugnant to the due process and equal protection of the law clauses of the Fourteenth Amendment because

(a) the intangible personal property, the transfer of which, in trust, was subjected to a domiciliary inheritance tax, had its situs in the State of New York, and outside of the State of New Jersey; and

(b) the transfer thereof occurred outside of the State of New Jersey, and beyond the jurisdiction of said state.

The only question, therefore, is whether the New Jersey Inheritance Tax Law, construed to provide a tax under the circumstances of this case, deprives appellants of their property without due process of law or denies to them the equal protection of the law.

SUMMARY OF ARGUMENT

The donor was a resident of New Jersey at all times and the property transferred was exclusively intangible in character. Those are the decisive facts.

Domicile of the owner, in itself, supports the power to tax the transfer of intangibles wherever situated. *Curry* vs. *McCanless*, 307 U. S. 357, 366, 367; *Pearson* vs. *McGraw*, 308 U. S. 313, 318. See also *Lawrence* vs. *State Tax Commission*, 286 U. S. 276, 279; *New York ex rel Cohn* vs. *Graves*, 300 U. S. 308, 313. This is so whether the transfer be at death by will, *Blodgett* vs. *Silberman*, 277 U. S. 1; or *inter vivos* by gift in contemplation of death, *Pearson* vs. *McGraw*, *supra;* or to take effect at or after death,

Curry vs. *McCanless, supra; Graves* vs. *Elliott*, 307 U. S. 383; *Bullen* vs. *Wisconsin*, 240 U. S. 625; and whether the transfer be complete when made as in *Pearson* vs. *McGraw, supra; VanDyke* vs. *Wisconsin Tax Commission*, 311 U. S. 605; or subject to reserved control by the donor until death as in *Curry* vs. *McCanless, supra; Graves* vs. *Elliott, supra; Bullen* vs. *Wisconsin, supra; Keeney* vs. *New York*, 222 U. S. 525.

The instant transfers, appellants concede, were made in contemplation of and intended to take effect at death. To prevent evasion such transfers may be taxed along with transfers at death without violating the Federal Constitution. *Milliken* vs. *United States*, 283 U. S. 15, 20; *Guaranty Trust Co.* vs. *Blodgett*, 287 U. S. 509, 513; *Coolidge* vs. *Long*, 282 U. S. 582, 596. They were completed on May 16, 1929 (twenty years subsequent to the effective date of Chapter 228, Laws of New Jersey 1909). The validity of the tax must be determined by the situation as it existed in 1929, when the deed was made, *Keeney* vs. *New York, supra* (at page 537). The taxable event is a transfer *inter vivos*. *Helvering* vs. *Hallock*, 309 U. S. 106, 111.

Where the power to tax exists, it is for the State to say when the property shall be valued, at what rate it shall be taxed, and when the tax shall be levied and paid. The measure of the tax is the value of the transferred property at the time when death brings it into enjoyment. A tax so measured does not violate the due process clause. *Keeney* vs. *New York, supra* (at page 537); *Helvering* vs. *Hallock, supra* (at page 111); *Salomon* vs. *State Tax Commission*, 278 U. S. 484, 490; *Klein* vs. *United States*, 283 U. S. 231; *Milliken* vs. *United States, supra*.

In determining whether the state then had the power to tax it is wholly immaterial whether the estates transferred were vested, defeasible or contingent, since questions of due process are not to be treated narrowly or pedantically, in slavery to forms or phrases, or by the

application of technical considerations, the niceties of the law of trusts or conveyances, or the refinements of the law of vested and contingent remainders. *Helvering* vs. *Clifford*, 309 U. S. 331, 334; *Helvering* vs. *Hallock*, *supra* (at pages 117, 118); *Pearson* vs. *McGraw*, *supra* (at page 318); *Klein* vs. *United States*, *supra* (at page 234); *Smith* vs. *Shaughnessy* (decided February 15, 1943—not yet officially reported), 87 L. Ed. (Adv. Op.) 504, 506, 63 S. Ct. 545, 547.

Taxation being a practical matter, it is equally unimportant that the transfers were effected through a trustee rather than directly from the donor to the donees, *Chase National Bank* vs. *United States*, 278 U. S. 327, 337; *United States Trust Co.* vs. *Helvering*, 307 U. S. 57, 60; and that the donor was not the *owner* of the property transferred at the time of death. *Whitney* vs. *Tax Commission*, 309 U. S. 530, 538, 539.

Every issue raised on this appeal is resolved adversely to appellants by the decisions of this Court in *Pearson* vs. *McGraw*, *supra*; *VanDyke* vs. *Wisconsin Tax Commission*, *supra*; and by the applicable principles announced in *Curry* vs. *McCanless*, *supra*; *Graves* vs. *Elliott*, *supra*; *Bullen* vs. *Wisconsin*, *supra*; *Graves* vs. *Schmidlapp*, 315 U. S. 657.

ARGUMENT.

POINT I.

The New Jersey Inheritance Tax Law Specifically Provides for the Taxation of the Testamentary, Intestate and Inter Vivos Transfer by a Resident of Intangible Personal Property Wherever Situated.

Chapter 228, Laws of 1909,[1] as amended by Chapter 144, Laws of 1929, section 1, subsection "Third," being the law in effect on May 16, 1929, when the trust agreement was executed, provided that:

> "1. A tax shall be and is hereby imposed upon the transfer of any property, real or personal, of the value of five hundred dollars ($500.00) or over, or of *any interest therein*[2] or income therefrom, *in trust* or otherwise, to persons or corporations, except as hereinafter provided, in the following cases:
>
> "First. When the transfer is by will or by intestate laws of this State from any person dying seized or possessed of the property while a resident of the State.
>
> . . . . . .
>
> "Third. When the transfer is of property *made by a resident*, * * * by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor or donor, or intended to take effect in possession or enjoyment at or after such death. * * *".

These provisions were continued in identical language down to the date of the decedent's death on November 9, 1936 (see Chapter 303, Laws of 1931; Chapter 244, Laws

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(1) Entitled: "An act to tax the transfer of property, of resident and non-resident decedents, by devise, bequest, descent, distribution by statute, gift, deed, grant, bargain and sale, in certain cases."

(2) All emphasis herein, unless otherwise noted, is by appellee.

of 1934; and Chapter 90, Laws of 1935—now Revised Statutes of New Jersey, 54:34–1c).

Section 26, Chapter 228, Laws of 1909 (now R. S. 54:33–1) directed that:

> "26. The words 'estate' and 'property,' wherever used in this act, except where the subject or context is repugnant to such construction shall be construed to mean the interest of the testator, intestate, grantor, bargainor or vendor, passing or transferred to the individual or specific legatee, devisee, heir, next of kin, grantee, donee or vendee, not exempt under the provisions of this act, *whether such property be situated within or without this State.* The word 'transfer,' as used in this act, shall be taken to include the passing of property, *or any interest therein, in possession or enjoyment, present or future*, by distribution by statute, descent, devise bequest, grant, *deed*, bargain, sale or *gift*."

It is clear, therefore, that the law from its effective date, July 4, 1909, to the date of decedent's death on November 9, 1936, specifically provided for a tax on the *inter vivos* transfer of property, *or any interest therein, in trust* or otherwise, "whether such property be situated within or without this state," when such transfer of *possession or enjoyment, present or future*, by *deed or gift*, was made by a resident in contemplation of or to take effect at or after death.

POINT II.

The Interpretation of the Law and the Determination by the Highest Court of the State That the Transfers Sub Judice Were of a Taxable Character Are Accepted as Conclusive Here.

The Court of Errors and Appeals, by adopting as its own the reasons given by the Prerogative Court for the affirmance of the tax, has specifically ruled that:

1. The tax law imposes a tax on the transfer of intangible personal property, wherever situated, when made by a resident in contemplation of or intended to take effect in possession or enjoyment at or after death (R. 36, 49).
2. The instant transfers were, under the facts, made in contemplation of death and intended to take effect in possession and enjoyment at the death of the donor (R. 36, 37).
3. The power to tax must be determined as of the date of the taxable event, i.e., in this instance, as of the date of the creation of the right to possession or enjoyment, present or future (R. 49).
4. The transfer here of all rights to future possession and enjoyment of the trust estate took place on May 16, 1929, when the trust was executed (R. 47).

This Court accepts as conclusive the interpretation placed upon the State tax law by the State Courts,

Guaranty Trust Co. vs. *Blodgett*, 287 U. S. 509, 513;
Saltonstall vs. *Saltonstall*, 276 U. S. 260, 270;
Stebbins vs. *Riley*, 268 U. S. 137, 146;
Orr vs. *Gilman*, 183 U. S. 278, 283;

as it does the State Courts' characterization of the transfers, and construction of the deed of trust,

Saltonstall vs *Saltonstall*, *supra* (at p. 270);
Orr vs. *Gilman*, *supra* (at pp. 283, 288);

leaving only the question as to whether the statute as so interpreted and applied to the transfers under consideration violates any provision of the Federal Constitution.

POINT III.

Power to Tax Must Be Determined As of the Date of Transfer, i. e., In This Instance, As of the Date of Creation of the Trust; and the Power Then Existed.

The controversy here arises principally out of differences in approach to the undisputed facts. While there are divergent views between the parties as to the import and application of certain decisions of this Court to the established facts of this case, the principal issue is the time as of which power to tax must be settled. Appellants say that power to tax, because the estates of the donees were of a contingent nature, must be determined as of the date of death of the donor, when the estates of the sons vested indefeasibly. Appellee says that power to tax must be determined as of the date of transfer, and that here the transfer took place as of the date of the execution of the trust agreement.

The New Jersey Courts have unanimously held that the taxable transfer in this case took place when the deed of trust was executed. That this determination is as conclusive here as their interpretation of the State tax law seems settled by the rulings of this Court in

Orr vs. *Gilman*, 183 U. S. 278, 288; and
Chanler vs. *Kelsey*, 205 U. S. 466, 476-478.

"* * * The Court of Appeals held that it was the *execution* of the power of appointment which subjected grantees under it to the transfer tax. This conclusion is binding upon this court in so far as it involves a construction of the will and of the statute. * * *"

Orr vs. *Gilman*, *supra* (at p. 288).

"As in *Orr* vs. *Gilman*, 183 U. S. *supra*, we must accept this decision of the New York Court of Appeals holding that it is the *exercise of the power which is the essential thing to transfer the estates upon which the tax is imposed.* * * *"

Chanler vs. *Kelsey*, *supra* (at p. 478).

For the purpose of determining liability of the transfers to a domiciliary inheritance tax it was competent for the New Jersey Courts to construe the trust agreement, and they did construe it, to create equitable estates, the transfer of which at that time might be subjected to tax. Every estate in the trust property coming into possession and enjoyment, present or future, arose out of and by reason of the deed, and the State Courts acted well within their rights in holding that the taxable event was the transfer *inter vivos* insofar as determination of the question of power to tax was concerned. The same view was taken by this Court in *Helvering* vs. *Hallock*, 309 U. S. 106, in disposing of the taxability of a transfer under section 302 (c) of the Revenue Act of 1926, likewise taxing transfers in contemplation of and intended to take effect at death, where it was held that (at pages 110, 111):

"Section 302 (c) deals with property not technically passing at death but with interests theretofore created. *The taxable event is a transfer inter vivos.* But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment."

The Prerogative Court ruled that (R. 47-48):

> "Since it must be conceded that a transfer to the sons did occur; that it was effected solely by the trust deed; that that deed was made solely by the owner-grantor; that from the moment that deed was executed and delivered, it and the transfers therein and thereby made were utterly beyond any and all power of the grantor to revoke, amend or in any wise control, *it necessarily follows that the transfer of the equitable remainder was made by the owner-grantor and that it was made by him at the time he executed and delivered the deed;* and, since at that time he was domiciled in New Jersey, New Jersey has the right to tax that transfer, notwithstanding the interest so transferred did not vest in the particular beneficiary until the grantor's death."

In *Keeney* vs. *New York*, 222 U. S. 525, a trust of intangibles was created by a New York resident with a New Jersey trustee in 1903. The donor died a resident of New York in 1907, and that state levied an inheritance tax on the resulting transfers. In sustaining the assessment this Court said (at page 537):

> "But the statute does not impose a tax on the property, but on the transfer. *The validity of that burden must be determined by the situation as it existed in 1903, when the deed was made.* At that time the grantor was a resident of the State of New York. This personal property there had its situs. She there made a transfer, which was taxable, * * *."

See also:

Paul, Federal Estate and Gift Taxation, Vol. 1, sec. 2.13, pages 139, 140.

Residence of the donor within the State at the time of transfer, and the intangible character of the property transferred, are sufficient in themselves to justify jurisdiction to tax. The New Jersey courts have so ruled in this case on the authority of the previous decisions of this Court.

All subjects over which the sovereign power of a state extends are objects of taxation.

McCullough vs. *Maryland*, 17 U. S. 316, 429.
Graves vs. *Schmidlapp*, 315 U. S. 657, 660.
Curry vs. *McCanless*, 307 U. S. 357, 366.
State Tax Commission vs. *Aldrich*, 316 U. S. 174, 177.

Intangibles and their transfer may be taxed by the state of domicile of their owner.

Blodgett vs. *Silberman*, 277 U. S. 1.
Curry vs. *McCanless*, 307 U. S. 357, 367, 372.
Lawrence vs. *State Tax Commission*, 286 U. S. 276, 280.

Domicile in itself establishes a basis for taxation where the transfer is of property of an intangible nature. Enjoyment of the privileges of residence within the State and the attendant right to invoke the protection of its laws are inseparable from the responsibility for sharing the costs of government.

Lawrence vs. *State Tax Commission*, 286 U. S. 276, 279.
New York ex rel. Cohn vs. *Graves*, 300 U. S. 308, 313.
Curry vs. *McCanless*, 307 U. S. 357, 366, 367.
Graves vs. *Schmidlapp*, 315 U. S. 657, 660.
First Bank Corp. vs. *Minnesota*, 301 U. S. 234, 240, 241.
Pearson vs. *McGraw*, 308 U. S. 313, 318.

"• • • domicile in itself establishes a basis for taxation. • • •"

Lawrence vs. *State Tax Commission, supra* (at page 279).

"• • • From the beginning of our constitutional system control over the person at the place of his domicile and his duty there, common to all citizens, to contribute to the support of the government have been deemed to afford an adequate constitutional basis for imposing on him a tax on the use and enjoyment of rights in intangibles measured by their value. *Until this moment that jurisdiction has not been thought to depend on any factor other than the domicile of the owner within the taxing state,* or to compel the attribution to intangibles of a physical presence within its territory, as though they were chattels, in order to support the tax. • • •"

Curry vs. *McCanless, supra* (at pages 366, 367).

That the intangibles here had a physical situs in the State of New York is not material. The power of the state of domicile of the owner of intangibles to tax their transfer is not foreclosed, under the due process or equal protection clauses of the Federal Constitution, by the fact that they are physically present in another state. Under the maxim *mobilia sequuntur personam* intangibles are ascribed a situs for taxation at the domicile of their owner wherever their physical presence may be.

Blodgett vs. *Silberman*, 277 U. S. 1, 10.
Graves vs. *Schmidlapp*, 315 U. S. 657, 660, 661.
Curry vs. *McCanless*, 307 U. S. 357, 366, 367.
Graves vs. *Elliott*, 307 U. S. 383, 387.
Pearson vs. *McGraw*, 308 U. S. 313, 318.

A jurisdiction which does not depend on physical presence within the state is not lost by declaring that it is absent.

Curry vs. *McCanless*, 307 U. S. 357, 366.

And it might also be mentioned at this point that it is not material that the trust agreement was executed in New York and the trust fully administered there.

> "* * * it is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax. * * *."
>
> *Curry* vs. *McCanless*, 307 U. S. 357, 368.

If the rule were otherwise, the domiciliary tax in the *Curry*, *Elliott*, *Pearson*, *Van Dyke* and *Bullen* cases could not have been sustained, as the trust in each of those cases was administered in a state other than the domicile of the transferor. As the Prerogative Court observes, the New Jersey act contains no requirement that the trustee and beneficiaries shall be legally domiciled in this State, or that the agreement of trust shall be executed, delivered and administered here (R. 42).

Appellants say that operation of the *mobilia sequuntur personam* "maxim is not effective to give a state power to levy a direct property tax thereon where the resident of the taxing state has only an equitable interest therein and the legal title is held elsewhere," citing *Brooke* vs. *Norfolk*, 277 U. S. 27; *Safe Deposit and Trust Co.* vs. *Virginia*, 280 U. S. 83. (Appellants' Brief, 12.) While not necessary to go so far in the instant matter, it would seem that that is exactly what this Court said could be done in *Stewart* vs. *Pennsylvania*, 312 U. S. 649, aff'g, 338 Pa. 9, 12 Atl. (2d) 444, where the right of Pennsylvania to assess a personal property tax was upheld on the authority of the *Curry* and *Elliott* cases, notwithstanding that the trust property was

physically present in New York, the legal title thereto was held by a trustee in New York and the only interest the Pennsylvania resident had therein was an estate for life.

On the foregoing general principles the Courts of New Jersey have upheld the validity of the present assessment and the constitutionality of the act under which it was assessed.

This brings us to a consideration of the following specific cases in which these principles have been applied by this Court in analogous situations, and which appellee contends are so directly to the point and which so conclusively resolve the jurisdictional issues raised by appellants as to render them wholly unsubstantial at this time.

Pearson vs. *McGraw*, 308 U. S. 313.
VanDyke vs. *Wisconsin Tax Commission*, 311 U. S. 605.
Curry vs. *McCanless*, 307 U. S. 357.
Graves vs. *Elliott*, 307 U. S. 383.
Graves vs. *Schmidlapp*, 315 U. S. 657.
Bullen vs. *Wisconsin*, 240 U. S. 625.

In *Pearson* vs. *McGraw*, *supra*, the jurisdiction of the State of Oregon to impose an inheritance tax on an *inter vivos* transfer made in contemplation of the death of the donor and to include the property transferred in the decedent's taxable estate at death, notwithstanding the fact that the property transferred was at all material times physically present in the State of Illinois, was upheld by this Court solely on the ground that the donor was domiciled in Oregon at the time of the transfer. It had been the custom of the donor (as in the present case) for many years prior to the transfer, to keep his securities with an Illinois Trust Company, under an agency agreement for the collection of principal and income and the investment of his funds. "When decedent established a domicile in Oregon in 1933, he continued that arrangement with the Illinois

trust company, with the result that those securities were always physically present in Illinois, never in Oregon" (page 314). On August 8, 1935, about six months before death, he directed the trust company to liquidate sufficient of his holdings in the agency agreement which with certain cash balances of his with the trust company would equal $450,000, and to acquire therewith forty-five $10,000 federal reserve notes (paper money). This was done and approximately a week later he executed a trust agreement, in Oregon, in contemplation of death, designating the Illinois trust company trustee, to which he transfererd the notes, to be held under the trust for the benefit of his daughter, son, their spouses and children. The trust, as here, was irrevocable, and under it the donor retained no interest, control or power whatsoever. Citing *Curry* vs. *McCanless* "and related cases" this Court held that control by the State of Oregon over the owner of the property was sufficient to support jurisdiction to tax.

Appellee respectfully submits that there is no material factual difference between that case and this one, except that there the property actually transferred was paper money (which may or may not have the characteristics of tangible personalty), while here the transferred property was at all times intangible. In each case the transfer was made in contemplation of death, by a resident donor of intangibles located elsewhere.

In *VanDyke* vs. *Wisconsin Tax Commission*, *supra*, the donor, a Wisconsin resident, executed trusts in Illinois, naming residents of Wisconsin as trustees. No interest in or control over the trust estates was reserved by the donor. The property transferred consisted of seven and one-half tons of silver dollars ($275,000) converted shortly before the transfer from federal bonds physically present in Illinois. The power of Wisconsin to collect a gift tax on the transfer based on the donor's domicile in that state, even though the subject matter of the gift had a physical

situs outside the state, was sustained on the authority of *Pearson* vs. *McGraw*.

In *Curry* vs. *McCanless, supra*, the decedent, a resident of Tennessee, had reserved income for life and a power to appoint the corpus of a trust estate created by her in Alabama, with personal property which always had a physical situs in Alabama, and the trustee was a corporation of that state and wholly administered the trust there. In *Graves* vs. *Elliott, supra*, the decedent, a resident at the time of her death of New York, had created a trust of intangible property while a resident of Colorado, with a Colorado corporate trustee. The decedent retained a life estate in the trust property and a power of revocation. Jurisdiction of the state of domicile of each donor to collect a death tax was upheld on the ground that each donor was the owner at the time of death of the property transferred; in the former because the reserved power to appoint at death,

> *Graves* vs. *Schmidlapp*, 315 U. S. 657, 660;
> *Chase National Bank* vs. *United States*, 278 U. S. 327, 338;
> *Bullen* vs. *Wisconsin*, 240 U. S. 625, 631;
> *Whitney* vs. *Tax Commission*, 309 U. S. 530, 538;

and in the latter because the reserved power to revoke

> *Bullen* vs. *Wisconsin*, 240 U. S. 625,

were deemed equivalent, for tax purposes, to ownership of the property subject to the powers. Jurisdiction to tax was determined in each of these cases as of the date of transfer of absolute ownership from the donors to the donees, which, because of the reserved powers, was the date of death when the power to appoint was exercised and the power to revoke was terminated.

In *Graves* vs. *Schmidlapp, supra,* the state of domicile of the appointor of a power (New York) was held to have jurisdiction for estate tax purposes over the corpus of a trust even though the property was held in trust in another state (Massachusetts). Again the power to appoint was deemed equivalent to ownership of the property subject to the power, and taxable at the domicile of the owner on the authority of the *Curry* and *Elliott* cases.

Bullen vs. *Wisconsin, supra,* involved the taxation in Wisconsin of a trust created by a resident of that state in Illinois, over which he reserved powers to revoke and appoint. Wisconsin's right to an inheritance tax was sustained against the claim of want of jurisdiction because of the physical presence of the trust property in Illinois.

The attention of the Court is also directed to the following decisions of state courts in which the power of the state of domicile of the transferor to tax the transfer of intangible personal property, under an irrevocable, *inter vivos* trust created elsewhere, has been sustained.

Blodgett vs. *Guaranty Trust Co.*, 144 Conn. 207, 158 Atl. 245.

Hackett vs. *Bankers Trust Co.*, 122 Conn. 107, 187 Atl. 653.

In re Ellis' Estate, 169 Wash. 581, 14 P. (2d) 37.

In all of these cases the right of the state of domicile of the owner of intangibles to assess a domiciliary inheritance tax was sustained, on the principle that residence within the state at the time of the taxable event is sufficient in itself to confer jurisdiction to tax the transfer of intangibles wherever located.

If the principles of the *Curry* and *Elliott* cases can be extended to such irrevocable and uncontrolled transfers as involved in the *Pearson* and *VanDyke* cases, and to support an *ad valorem* tax on a resident's life interest in a nonresident trust, as in *Stewart* vs. *Pennsylvania*, 312 U. S. 649,

it is respectfully submitted that they can be applied here without distortion.

But appellants challenge application of several of these authorities on alleged factual differences. They argue that the *VanDyke* case cannot be deemed controlling, first, because it involved a gift tax—not an inheritance tax—and, second, because the trustee and inferentially all of the beneficiaries were residents of the state of the donor's domicile; adding also that it does not appear that any of the trust beneficiaries in the *Pearson* case were nonresidents of the State of Oregon. Apparently the fact has been overlooked that the only authority cited for affirmance of the tax in the *VanDyke* case was *Pearson* vs. *McGraw*, an inheritance—not a gift—tax proceeding, justifying the inference that this Court saw no difference in the nature of the proceedings or the applicable legal principles. And long ago it was held, and not questioned since, that where jurisdiction to tax is based on domicile of the transferor of intangibles within the taxing state, the residence of the trustees and beneficiaries is immaterial.

Keeney vs. *New York*, 222 U. S. 525, 537.

See also:

Graves vs. *Schmidlapp*, 315 U. S. 657, 661;

and compare:

Bullen vs. *Wisconsin*, 240 U. S. 625;
Graves vs. *Elliott*, 307 U. S. 383;
Curry vs. *McCanless*, 307 U. S. 357;

in each of which the trustee resided in a state other than that in which the donor lived.

Emphasis is also laid by appellants on the fact that the gift in the *Pearson* case was "admittedly" made in contemplation of death. The significance of this difference is

not enlarged upon and is not readily apparent. Atkins' transfers were held by the New Jersey courts to have been made in contemplation of death as well as to take effect at or after death, and appellants have not to this date contested either of these rulings. As a matter of fact they concede that this "finding is not questioned on this appeal." (Brief, 5.) Further, that determination is not challenged here by any facts appearing of record. *Cf.*

Milliken vs. *United States*, 283 U. S. 15, 19.

That the donor in the *Pearson* case did not reserve a life interest in the trust estate is also stressed by appellants as a distinguishing feature (Brief, 34). Because the donor transferred beneficial possession as well as legal title, appellants argue that the transfer was complete when made. Reservation of income for life from the property transferred is a decisive factor in determining whether a transfer is of a taxable nature, i.e., whether it was intended to take effect in possession and enjoyment at or after death. See *Guaranty Trust Co.* vs. *Blodgett*, 287 U. S. 509. But it has never been held, as far as appellee is aware, that this fact has a controlling effect on the question of jurisdiction to tax.

It is further urged that the circumstances surrounding the transfers in the *Pearson* and *VanDyke* cases evidenced an obvious intention to evade taxation, while here there is no suggestion that the transfer was to evade death duties. Power to tax in this case is not based on an attempted circumvention of the New Jersey tax laws. Where the power to tax exists it is not important whether there was an intention to evade or avoid taxation.

Bullen vs. *Wisconsin*, 240 U. S. 625.

Appellants say that the *Curry* and *Elliott* cases have no application because the transfers there taxed took effect as of the dates of death and not at the time of the execution

of the agreements of trust. That is true, but the principle applied in those cases; i. e., that the *inter vivos* transfer of intangibles may be taxed by the state of domicile of their owner regardless of their physical situs, has the same force in the instant matter as there. The transfers in those cases were deemed taxable as of the dates of death of the respective donors because by retention of a power to appoint and a power to revoke they, for tax purposes, remained the legal owners of the trust property until the power to appoint was exercised at death, and the power to revoke was extinguished by death, thereby moving the taxable event down to the date of death. Such being the effect of the reserved powers, it necessarily followed that the transfer of the intangibles, no matter where located, by a resident owner, was subject to a domiciliary inheritance tax on the authority of *Blodgett* vs. *Silberman*, 277 U. S. 1. Since Atkins reserved neither power to appoint, revoke or otherwise control the final disposition of the trust estate, the transfer of the estates in the trust property took place as of the date of the trust agreement. On that date he made a gift in contemplation of and intended to take effect in possession and enjoyment at his death of intangible property in which his ownership was then as full and complete as the ownership of the transferors in the *Curry*, *Elliott* and *Silberman* cases. That power to tax exists whether the transfer is fully completed *inter vivos* or remains subject to the donor's control until death, is made certain by this Court's determinations in the *Pearson* and *VanDyke* cases, where the power of the state of domicile to tax a fully completed *inter vivos* transfer was affirmed, in the latter case solely on the authority of the former, and in the former on the authority of the *Curry* and *Elliott* cases.

Finally appellants claim that the *Pearson* and *VanDyke* cases have no application whatsoever because the estates there created, they say, vested as of the dates of the respective trusts, while here the estates were contingent, which

leads to consideration of their principal contention that the power to tax in the case of an *inter vivos* transfer of future interests of a contingent character must be determined as of the date of death of the donor; and, as of that date, neither the property, nor the "owner," was within the jurisdiction of New Jersey for tax purposes.

POINT IV.

Appellants Are in Error in Alleging That the Power to Tax Must Be Determined as of the Date of the Donor's Death and That the Owner of the Property Transferred Was the Trustee and Not the Donor.

Specifically, their position is that:

> "* * * From the time of the execution of the trust agreement the *title* to these securities was in the New York *trustee* and, if the above mentioned maxim has any value, their fictitious situs based on the domicile of the owner was in New York, as well as their actual situs." (Brief, 16-17.)
>
> "* * * The full legal title was and had been for some years in the New York *trustee*. Both the actual situs and the *ownership* were in that state, and there was no New Jersey *ownership* with which to construct a fictitious situs through the maxim *mobilia sequuntur personam*." (Brief, 39-40.)

Relying on *Binney* vs. *Long*, 299 U. S. 280, appellants argue that since the estates of the ultimate beneficiaries were determined by the New Jersey courts to have been contingent until the death of the donor, the power to tax must be decided as of that date, rather than as of the date of the deed. That case and *Coolidge* vs. *Long*, 282 U. S. 582, involved the power of the State of Massachusetts to collect inheritance taxes on transfers pursuant to deeds of

trust executed at a time when there was no law in effect taxing such transfers. In the *Coolidge* case, where the estates were deemed to have vested as of the date of the deed, the transfers were held not taxable under a statute passed subsequently but before the donor's death. In the *Binney* case, because of the contingent nature of the estates, the transfers were held taxable under an act passed before the donor's death, even though after the effective date of the deed. The controlling principle of these cases is that in determining power to tax we must look to the date of the deed begetting the transfer. If the power to tax then exists it is within the power of the state to say when and how that power shall be exercised.

We are not here concerned with an attempted retroactive application of a tax law. This is not a tax on a transfer of property fully perfected before enactment of the tax law, such as condemned by this Court in

Nichols vs. *Coolidge*, 274 U. S. 531;
Untermyer vs. *Anderson*, 276 U. S. 440;
Helvering vs. *Helmholz*, 296 U. S. 93;
White vs. *Poor*, 296 U. S. 98.

Chapter 228, Laws of New Jersey, 1909, taxing *inter vivos* transfers in contemplation of and intended to take effect at or after death, had been in operation nearly twenty years before the execution of the trust in the instant case.

But appellants say that no rights passed and no estates were created when the deed was executed, and that we must, therefore, look to the date of the donor's death in determining whether a taxable transfer resulted. They claim that as of the date of death, when the estates vested, the beneficiaries were nonresidents and the property comprising the trust was neither located within nor *owned* by a resident of New Jersey. The domiciles of the beneficiaries and the physical location of the trust intangibles, as

previously observed, are not controlling factors, but the domicile of the *owner* is decisive. Without conceding that power to tax is to be decided as of the date of the donor's death, let us consider the import of appellant's claim that the *owner* of the intangibles at the decedent's death was a nonresident of this State.

When appellants say that New Jersey cannot tax because the "owner" of the property was domiciled outside this State, they do not, of course, mean the decedent. He was at all times a resident of this State. What they deem decisive in this case is not the domicile of the donor who made the transfer, but the domicile of the trustee voluntarily selected by decedent to effectuate his testamentary plan. The single formal element relied upon to oppose the tax is, therefore, that *the trustee was not a resident of New Jersey at the time of the donor's death.*

For the contention of appellants to have a semblance of validity, it is necessary to make three primary assumptions, each superimposed upon the other. First, it must be assumed that by the deed the trustee received such absolute title and ownership of the property that its act in transferring the property to the donees, at decedent's death, was not the act of the decedent, but the independent and voluntary act of the trustee; second, if the trustee acted independently of the donor, then the donees derived their succession not from the donor but from the trustee; and, third, if the donees derived their succession from the trustee, then, since ours is a succession tax, New Jersey is seeking to impose a tax on succession from a nonresident—a living nonresident, incidentally—involving intangibles not located in the State, in excess of its constitutional power.

Presumably if the trustee in the instant case had been a New Jersey bank or individual residing in this State at the time of the donor's death, appellants would concede power to tax (Brief, 35), and yet if their theory is

correct that the only transfer which can be taxed is the transfer from the *trustee* to the beneficiaries, it is difficult to understand how a tax could be levied even in that event, since the New Jersey law does not attempt to impose an inheritance tax on transfers from corporations to their transferees under any circumstances, nor on transfers of living individuals, even though they be trustees, when not made in contemplation of or intended to take effect at or after death. The fact is that on their theory the donor, the donees and the trustee may all be residents, the trust deed executed, and the trust property physically located and fully administered here, and still no tax could be levied because the transfer would be from the *trustee* to the donees, and not from the donor. Even transfers by will and the intestate laws could not be reached under the present law because the taxable event, as they argue, would be the transfer from the executor, the administrator, or the testamentary trustee, as *owner*, to the beneficiaries or next of kin. And joint bank accounts and life insurance proceeds could not be reached because the actual transfers in those instances would be by the banks and insurance companies.

Appellants do not cite a single authority for this novel claim and none is known to appellee. To the contrary, this Court has consistently ruled that a transfer through the intervention of a third party may be taxed the same as one directly from the decedent to the beneficiary.

> *Chase National Bank* vs. *United States*, 278 U. S. 327, 337.
>
> *United States Trust Co.* vs. *Helvering*, 307 U. S. 57, 60.

And it is not necessary that the property comprising the taxable transfer be *owned* by the donor at death. Transfers arising out of joint tenancies, tenancies by the entirety, the exercise of a power of appointment conferred by the

will of another, life insurance proceeds payable to specifically designated beneficiaries, and gifts in contemplation of death and intended to take effect at death may be included in the taxable estate, notwithstanding the fact that the decedent is not the "owner" at the time of his death of the property passing, and that it forms no part of his estate for testate or intestate distribution.

Whitney vs. *Tax Commission*, 309 U. S. 530, 538.
United States vs. *Wells*, 283 U. S. 102, 116-117.
Helvering vs. *City Bank*, 296 U. S. 85, 91.
Porter vs. *Commissioner*, 288 U. S. 436, 442, 443.
Tyler vs. *United States*, 281 U. S. 497.
Helvering vs. *Hallock*, 309 U. S. 106, 110, 111.

"In making this diversion, the state is not confined to that kind of wealth which was, in colloquial language, 'owned' by a decedent before death; nor even to that over which he had an unrestricted power of testamentary disposition. It is enough that one person acquires economic interests in property through the death of another person, even though such acquisition is in part the automatic consequence of death or related to the decedent merely because of his power to designate to whom and in what proportions among a restricted class the benefits shall fall.

"The books are replete with recognition of these general principles. Thus the full value of property may be taxed as part of the decedent's gross estate even though held by him merely as a tenant by the entirety, *Tyler* vs. *United States*, 281 U. S. 497; likewise the full value of property in which the decedent was only a joint tenant may be taxed to his estate, *United States* vs. *Jacobs*, 306 U. S. 363. In neither of these instances was there an exact equation between the 'beneficial interest' owned by the decedent just

before his death and that by which the tax was measured. Again, this Court found no difficulty in sustaining a tax on the transfer of property conveyed in trust by a decedent during his life, although he had divested himself of all beneficial interest in the corpus and had only reserved the power to change beneficiaries, excluding, however, himself and his estate from the range of choice. *Porter* vs. *Commissioner*, 288 U. S. 436."

Whitney vs. *Tax Commission*, *supra* (at pages 538, 539).

Of course in every case of transfer by trust, whether testamentary or *inter vivos*, the sequence of tradition is from the donor to trustee and from trustee to ultimate beneficiary. Certainly it is apparent, without argument, that if the New Jersey act limited taxation to a succession that is derived from the "title owner" of property, the "title" could be shifted around *ad infinitum*. Furthermore, the provision taxing transfers in trust would be superfluous in the case of corporate trustees, for we would never have a "decedent." In fact, even as to individual trustees the situation would be no different, since the transfer would be from a living person and certainly could not be said to have been made in contemplation of or to take effect at or after his death, when he was simply carrying out the directions of his principal as set forth in the trust agreement. Only where the donor appointed himself the sole trustee would appellants' theory admit a taxable transfer had occurred. What the answer would be in a case where the donor appointed himself and a corporation trustee is not known.

Before the Court of Errors and Appeals appellants argued that:

"In the case at bar, there are two transfers of the title to the trust fund assets, one when the grantor

> divested himself thereof, and conveyed everything he owned to the trustees irrevocably and second when the title passed from the trustees to the beneficiaries. It is the latter transfer and not the former one which is the taxable transfer."

Certainly that is not the law in New Jersey.

> *Carter* vs. *Bugbee*, 92 N. J. Law 390, 392.
> *Fagan* vs. *Bugbee*, 105 N. J. Law 85, 87.

The Court of Errors and Appeals in *Carter* vs. *Bugbee*, *supra* (at page 392), says that:

> "* * * the transfer intended to be taxed is that of the settlor to his beneficiaries, and not that to his trustees."

And without enlarging on that statement beyond logical implications we may add "and not that by the trustees to the beneficiaries." Looking through form to substance and practical result the Court in the *Carter* case says that where *inter vivos* transfers are involved, the only parties to be considered are the donor and his donees. And this practical view fully accords with the expressions of this Court in the numerous cases hereinafter cited to the effect that in the application of the due process clause to these tax matters technical considerations and the niceties of the law of trusts and conveyances should not obscure the basic issue. (*Helvering* vs. *Clifford*, 309 U. S. 331, 334.)

Appellants concede that "the rights of the parties were unalterably fixed, as far as the decedent's ability to change them was concerned, by the trust deed, which was irrevocable, and contained no power of appointment" (Statement as to Jurisdiction, page 17), but they do not reconcile this concession with their claim that no transfers of a taxable

nature arose at the time the trust was created. In denying this claim the Prerogative Court ruled (R. 47-48):

"That the transfers to the two sons were contingent is true; and that those transfers did not become *complete* until the happening of the contingency is also, necessarily true; but that *no* transfer (to the sons) occurred until the happening of that contingency, is not true. It cannot be controverted that there *was* a transfer of interest from the owner-grantor; and that the *only act* of the owner-grantor in making that transfer was the execution and delivery by him of the deed of trust. That deed was irrevocable, and after its execution and delivery there was no act by the grantor, and no failure to act by him, which in any wise did, or could, have any operation or effect in effectuating or preventing the transfer. By the deed he made a transfer of the interest in remainder, and thereafter he had no control whatever over that interest. Thereafter that interest must necessarily vest, at his death, in one or other of the alternative contingent remaindermen—and that by operation of the deed which he had made. It may be said that the transfer was a continuing affair, incomplete until his death and completed at his death; but it is inescapable that *he* made the transfer; and that he made it *at and by* his execution and delivery of the trust deed; and that that execution and delivery was the *only* thing he did in making the transfer."

(Emphasis above by the Court.)

The same view of an identical situation was taken by this Court in *Coolidge* vs. *Long*, 282 U. S. 582, where the trust provided that the

"income was to be paid in these proportions (four-sevenths and three-sevenths) to each of the settlors

> during their joint lives and then the entire income to the survivor, and, upon the death of the survivor, the principal was to be divided equally among their five sons; provided that, if any of the sons should predecease the survivor of the settlors, his share should go to those entitled to take his intestate property under the statute of distributions in force at the death of the survivor, * * * (pages 593-594.)

and where the Court, as here, was dealing with the power of a state to levy a succession tax—a tax on the right of the beneficiary to receive—and not a transfer tax. The trust was irrevocable (page 594). Under these circumstances this Court said (at pages 597, 598):

> "By the deed of each grantor one-fifth of the remainder was immediately vested in each of the sons subject to be divested only by his death before the death of the survivor of the settlors. *It was a grant in praesenti to be possessed and enjoyed by the sons upon the death of such survivor.* * * * *The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment.* The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust. * * * *Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries.* Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen. * * * Nothing moved from her or him or from the estates of either when she or he died. *There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds.* * * *"

Incidentally, it might be observed at this point that if the time for the determination of the power to tax is to turn on the question whether the estates created are vested, subject to divestiture, or merely contingent, then another question arises, viz.: Is the character of the estates to be decided by the State courts or by this Court? In the *Coolidge* case (at page 597) this Court held that:

> "* * * It is well understood that, when the jurisdiction of this court is invoked to determine whether a state law impairs the rights of the litigant under a prior contract, or whether the State is depriving him of his property without due process of law in violation of the Fourteenth Amendment and the question turns upon the existence or terms of a contract, this court is bound to determine for itself whether there is a contract and to ascertain its true meaning and effect. That rule is necessary in order that this court may properly enforce these provisions of the Constitution. * * *"

While the New Jersey courts have termed the estates of the sons contingent, nevertheless, it is to be observed that they are created in the same language used by the donors in *Coolidge* vs. *Long*, *supra*, where this Court ruled such estates to be of a vested nature for purposes of constitutional inquiry, even though they remained defeasible until the death of the survivor of the donors. So that even applying technical rules here for the ascertainment of the character of the sons' interests, still there is no error in fixing the taxable event as of the date of the deed of trust. If, to the contrary, state court characterization of the quality of the estates created in each case is to be conclusive here, then, of course, inheritance taxes on identical trusts will be held to violate or not to violate the due process clause, depending upon whether the estates transferred are deemed locally to be defeasible or merely con-

tingent. It is not believed that application of the refinements of the law of trusts has ever been carried this far.

But appellants say that if the transfer took place when the deed was executed, still the State did not then appraise the property and estates transferred, as they infer was done in *Pearson* vs. *McGraw*, and levy a tax as of that date, according to the quality and value of the interests as they then existed, but that it valued the trust property as the donees took it on the date of the donor's death. There is no basis for the supposition that Oregon, in the *Pearson* case, valued the property there transferred as of the date of transfer. But be that as it may, the fact is immaterial since the rule is that

> "* * * * where the power to tax exists, it is for the State to fix the rate and to say when and how the amount shall be ascertained and paid. The fact that the liability was imposed when the transfer was made in 1903, and that payment was not required until the death of grantor in 1907, does not present any federal question."
>
> *Keeney* vs. *New York*, 222 U. S. 525, 537.

Only the value of the corpus as of the date of death, computed at $376,917.04, was included for tax purposes, whereas the trust had at least a par value on the date of creation of $389,800. As further observed in the *Keeney* case (at page 537):

> "* * * * The fact that the assessment and payment were postponed until the death of the grantor would be a benefit to the remainderman in the many instances in which values decreased. * * * *"

Where the transfer is taxable when made, there is no constitutional objection to legislation requiring valuation of the property as of the date of the donor's death rather

than as of the date of transfer, or the application of higher rates of taxation in effect at a later date.

Milliken vs. *United States*, 283 U. S. 15.
Klein vs. *United States*, 283 U. S. 231.
Salomon vs. *State Tax Commission*, 278 U. S. 484, 490.

"• • • The due process clause places no restriction on a State as to the time at which an inheritance tax shall be levied or the property valued for purposes of such tax. Compare *Cahen* vs. *Brewster*, 203 U. S. 543."

Salomon vs. *State Tax Commission*, *supra* (at p. 490).

Once liability to tax is established the assessment of the tax becomes mere machinery. The New Jersey courts have ruled that property transferred in contemplation of and to take effect at or after death shall be valued as of the date of death.

Wimpfheimer vs. *Martin*, 126 N. J. Law 502.
Nicholas vs. *Martin*, 127 N. J. Law 35, aff'd, *sub nom.*, *Rutgers* vs. *Martin*, 127 N. J. Law 603.
Hartford vs. *Martin*, 122 N. J. Eq. 489, 498, 499, aff'd, 120 N. J. Law 564, aff'd, 122 N. J. Law, 283.

Before the Court of Errors and Appeals appellants conceded that:

"• • • If the trust instrument had created a vested remainder, domicile of the grantor at the time of its execution would have been sufficient."

Appellants apparently reason that a New Jersey resident may not avoid domiciliary inheritance taxes by stepping out of the state momentarily and making either an outright gift or even one in trust with a nonresident trustee, of intangibles located elsewhere, if the estate in remainder

is a vested one, but that he may accomplish this purpose if he will but create contingent remainders. Power to tax a vested estate in remainder seems to be conceded even in face of their claim that the "owner" of the trust property at the donor's death, i. e., the trustee, would not be legally domiciled in this State and that actual transfer of the property in that case, as in the case of a contingent remainder, would be from the trustee and not from the donor. How they reconcile these facts, present with equal force in each situation, is not stated. In any event, it is clear that the result, if it has any justification at all, is reached only by the application of highly technical rules rather than by a consideration of substance and practical result. Questions of power to tax are to be governed by the substance of things rather than by the application of technical considerations, niceties of the law of trusts or conveyances or the casuistries of the law of contingent and vested remainders.

Helvering vs. *Clifford*, 309 U. S. 331, 334.
Helvering vs. *Hallock*, 309 U. S. 106, 117, 118.
Smith vs. *Shaughnessy* (decided February 15, 1943—not yet officially reported), 87 L. Ed. (Adv. Op.) 504, 506, 63 S. Ct. 545, 547.
Tyler vs. *United States*, 281 U. S. 497, 503.
Pearson vs. *McGraw*, 308 U. S. 313, 318.
Saltonstall vs. *Saltonstall*, 276 U. S. 260, 271.
Klein vs. *United States*, 283 U. S. 231, 234.

"* * * Technical considerations, niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes should not obscure the basic issue."

Helvering vs. *Clifford*, *supra* (at page 334).

"* * * The law of contingent and vested remainders is full of casuistries. There are great diversities among the several states as to the conveyancing significance of like grants; sometimes in the same state there are conflicting lines of decision, one series ignor-

ing the other. * * * The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which have their historic justification but possess no relevance for tax purposes. These unwitty diversities of the law of property derive from medieval concepts as to the necessity of a continuous seisin. *Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth.*"

Helvering vs. *Hallock*, *supra* (at pages 117, 118).

To permit the taxing power to extend to vested but not contingent remainders would certainly substitute form for substance. As this Court said in *Pearson* vs. *McGraw*, *supra* (at page 318):

"* * * to hold that there is a constitutional barrier to the tax sought to be imposed would be to make a fetish of form. It would make the principles of the decisions of this Court on the constitutional power to tax devoid of any reason or function apart from a ritual of tax avoidance. * * * Questions of due process are not to be treated 'narrowly or pedantically, in slavery to forms or phrases.' * * *"

and again in *Smith* vs. *Shaughnessy*, *supra* (at p. 506):

"We cannot accept any suggestion that the complexity of a property interest created by a trust can serve to defeat a tax. For many years Congress has sought vigorously to close tax loopholes against ingenious trust instruments. Even though these concepts of property and value may be slippery and elusive they cannot escape taxation so long as they are used in the world of business. * * *"

Want of power to tax, appellants argue, is grounded on the fact that the donor in making the transfer, exercised no privilege and received no protection or benefit conferred by the laws of New Jersey, therefore there is no basis for the imposition of a tax (Brief, pages 17, 18). But this Court has said in *Curry* vs. *McCanless, supra*, that "it is undeniable that the state of domicile is not deprived, by the taxpayer's activities elsewhere, of its constitutional jurisdiction to tax" (page 368) and that "A jurisdiction which does not depend on physical presence within the State is not lost by declaring that it is absent." (page 366.) Here jurisdiction to tax is based on the domicile of the owner, not on physical presence of the trust estate, within the boundaries of New Jersey. That the donor chose to avail himself of privileges and benefits conferred by the laws of another jurisdiction cannot deprive the state of his domicile of its power to tax. If the rule were otherwise this Court could not have reached the conclusion that it did reach in the *Curry*, *Elliott*, *Pearson*, *VanDyke*, *Keeney* and *Bullen* cases, since in each instance the transfer in the final analysis was accomplished without recourse to the laws of the state of domicile of the donor. Likewise probate of a testator's will and administration of his estate elsewhere have never been held to deprive the state of domicile of its power to tax the testamentary transfer of his intangibles wherever located.

Blodgett vs. *Silberman*, 277 U. S. 1.
Nevin vs. *Martin*, 22 F. Supp. 836, 840.
In re Hartman's Estate, 70 N. J. Eq. 664.

As made clear in the *Pearson* and *VanDyke* cases a legally domiciled donor may not claim freedom from a domiciliary tax on the transfer of intangibles under the due process and equal protection clauses, by the simple expedient of stepping across state borders and making the transfer.

POINT V.

The Court of Errors and Appeals Correctly Held That the Assessment and the Statute Under Which It Was Levied Did Not Violate Any Provision of the Fourteenth Amendment.

It is settled that there is no constitutional inhibition against taxing *inter vivos* transfers of a testamentary character along with transfers by will and the intestate laws in order to prevent facile evasion of death duty laws.

Keeney vs. *New York*, 222 U. S. 525, 533, 534.
Guaranty Trust Co. vs. *Blodgett*, 287 U. S. 509, 513.
Coolidge vs. *Long*, 282 U. S. 582, 596.
Milliken vs. *United States*, 283 U. S. 15, 20.
Bullen vs. *Wisconsin*, 240 U. S. 625.

And to accomplish this well-understood purpose it is quite apparent from the determinations in the *Pearson*, *Van-Dyke*, *Curry* and *Elliott* cases that the states are allowed great latitude without infringing constitutional provisions.

Although there is no constitutional barrier to double taxation,

State Tax Commission vs. *Aldrich*, 316 U. S. 174.
Curry vs. *McCanless*, 307 U. S. 357, 368.
Graves vs. *Elliott*, 307 U. S. 383.
Graves vs. *Schmidlapp*, 315 U. S. 657.
Cream of Wheat Co. vs. *Grand Forks*, 253 U. S. 325.

it should be mentioned that the question here is not whether the transfer of the intangible property should be taxed twice, but whether it shall be taxed at all. If New Jersey, the domicile of the transferor, cannot tax, then there will be no tax, since New York has asserted no claim to a tax, having no statute for the taxation of the transfer of intangibles of nonresidents, and having had since January 1, 1939 (Art. XVI, sec. 3), the following constitutional provision against such taxation:

"Sec. 3. Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation, and, *if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state, provided that if no other state has jurisdiction to subject such property held in trust to death taxation, it may be deemed property having a taxable situs within this state for purposes of death taxation.* Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except that the income therefrom may be taken into consideration in computing any excise tax measured by income generally. Undistributed profits shall not be taxed."

In fact New York and New Jersey are included in a group of thirty-seven states and the District of Columbia limiting taxation of the transfer of intangibles to the state of domicile of the owner, [3] either because they have no laws for the purpose,[4] or because they have enacted reciprocal exemption statutes,[5] leaving only seven states that specifically tax such transfers[6]—the remaining five have not been classified because of statutes of doubtful application.[7]

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[3] See Vol. 4, Commerce Clearing House, Inc., Inheritance, Estate and Gift Tax Service (7th Ed.), pages 81,045 *et seq.*, sec. 12,080.

[4] Of which there are 18: Connecticut, Delaware, District of Columbia, Florida, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, Rhode Island, Tennessee, Vermont, Virginia, Washington.

[5] Of which there are 19: California, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, West Virginia, Wisconsin, Wyoming.

[6] Arizona, Idaho, Montana, Oklahoma, South Dakota, Texas, Utah.

[7] Alabama, Arkansas, Colorado, Georgia, Kentucky.

A majority of the states, therefore, have adopted a policy of one death duty on the transfer of intangibles, and that at the domicile of the transferor, thereby agreeing among themselves that the state of domicile has a superior claim. Obviously, however, if residents may escape the domiciliary tax by creating their irrevocable trusts of intangibles elsewhere, then it will be imperative that the death tax laws of those states be revised to prevent such property from going tax free.

There is no indication in the previous decisions of this Court that such a change is necessary. Consistently this Court has upheld the power of the state of domicile to tax the transfer, in trust, of intangibles wherever situated, whether the trust was subject to a power to control reserved by the transferor, as in the *Curry* and *Elliott* cases, or was absolutely beyond the control of the transferor, as in the *Pearson* and *VanDyke* cases.

Power to tax, this Court ruled in *Curry* vs. *McCanless*, *supra* "has not been thought to depend on any factor other than the domicile of the owner within the taxing state." The donor here being a resident at all times, and the property transferred being intangible in character, the Court of Errors and Appeals correctly decided that New Jersey possessed the power to tax the transfer, and that New Jersey by an act in effect long prior to the effective date of the transfer has exercised that power; therefore, it is respectfully submitted that the judgment below should be in all respects affirmed.

David T. Wilentz,
Attorney-General of New Jersey.

William A. Moore,
Assistant Attorney-General,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES.

No. 659.—October Term, 1942.

Central Hanover Bank and Trust Company, a Banking Corporation of the State of New York, George Chew Atkins and John Norton Atkins, as Executors, etc., et al., Appellants, *vs.* William D. Kelly, State Tax Commissioner of New Jersey.	Appeal from the Court of Errors and Appeals of the State of New Jersey.

[May 3, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

New Jersey imposes a tax, with exceptions not material here, "upon the transfer of any property, real or personal, of the value of five hundred dollars ($500.00), or over, or of any interest therein or income therefrom, in trust or otherwise, to persons or corporations, . . . in the following cases . . . Third. When the transfer is of property[1] made by a resident . . . by deed, grant, bargain, sale or gift made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death," Rev. Stat. 1937, § 54:34-1.

Prior to 1929 decedent, who at all times relevant here was a resident of New Jersey, owned certain securities which he kept in New York City in safekeeping with the appellant trust company, a New York corporation. In 1929 he went to New York City and executed a trust agreement by which he transferred those securities to the appellant corporation as trustee. The trust deed was an irrevocable agreement under which he retained no control over the property. It contained a provision that it was to be construed according to the laws of New York where it was made and where it was to be enforced. It provided that the trustee should pay the net income to the grantor during his life and thereafter to his wife

[1] The statute embraces the transfer of property "whether such property be situated within or without this State." Rev. Stat. 1937, § 54:33-1. The word "transfer" is defined so as to include "the passing of property, or any interest therein, in possession or enjoyment, present or future," by deed. *Id.*

for life in case she survived him. In the event that the grantor's wife did not survive him and his two sons did, then the trustee was to transfer to each son one-half of the principal. The wife predeceased the grantor, who died in 1936 a resident of New Jersey. Both sons survived him. They were non-residents of New Jersey. The securities were at all times kept in New York and there administered by the trustee.[2]

The New Jersey Prerogative Court held on an appeal from the Tax Commissioner that the creation of the so-called equitable contingent remainders in the sons was a "transfer" of an interest in the property by deed within the meaning of the statute at a time when the grantor was domiciled in New Jersey;[3] that that transfer was made in contemplation of the grantor's death and intended to take effect in possession or enjoyment at or after his death; and that it was that transfer rather than the property on which the tax was laid. It accordingly upheld the assessment of the Commissioner against the contention of appellants that the statute as construed and applied violated the due process and equal protection clauses of the Fourteenth Amendment. 129 N. J. Eq. 186. Both the Supreme Court and the Court of Errors and Appeals of New Jersey affirmed. See 127 N. J. L. 468, 129 N. J. L. 127. The case is here on appeal. See 237(a) of the Judicial Code, 28 U. S. C. § 344(a).

It is much too late to contend that domicile alone is insufficient to give the domiciliary state the constitutional power to tax a transfer of intangibles where the owner, though domiciled within the state, keeps the paper evidences of the intangibles outside its boundaries. See *Blackstone* v. *Miller*, 188 U. S. 189; *Blodgett* v. *Silberman*, 277 U. S. 1; *Curry* v. *McCanless*, 307 U. S. 357 and cases cited. The command of the state over the owner, the obligations

[2] Art. XVI, Sec. 3 of the Constitution of the State of New York provides: "Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purpose of taxation, and, if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state, provided that if no other state has jurisdiction to subject such property held in trust to death taxation, it may be deemed property having a taxable situs within this state for purposes of death taxation."

[3] The Court held in the alternative that there was a taxable transfer under the statute even if it be assumed that the remainder was vested in the grantor until the happening of the contingency. Under that view there was no transfer until the actual vesting at his death. Yet, at that time he was domiciled in New Jersey. So the transfer was taxable. 129 N. J. Eq. pp. 212-213.

which domicile creates, the practical necessity of associating intangibles with the person of the owner at his domicile since they represent only rights which he may enforce against others—these are the foundation for the jurisdiction of the domiciliary state to tax. *Curry* v. *McCanless*, *supra*. We recently applied that principle to sustain, on facts very close to the present ones, Oregon's power to tax a transfer of intangibles held in Illinois by one domiciled in Oregon. *Pearson* v. *McGraw*, 308 U. S. 313. And see *Van Dyke* v. *Tax Commission*, 235 Wis. 128, aff'd 311 U. S. 605. The execution of the present trust agreement in New York, the circumstance that the remaindermen as well as the trustee were non-residents of the taxing state are quite immaterial. Domicile is the single controlling consideration in this situation, as it is in the case of the taxation of income derived from activities outside the state. *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 279; *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308.

Appellants contend, however, that at the time of the execution of the trust agreement there was no taxable transfer to the sons; that their interests were wholly speculative and contingent and did not become taxable until they became vested interests; and that New Jersey has not levied a tax according to the quality and value of the interests as they existed in 1929 but has appraised the property at its value at the time of the grantor's death. They also argue that if the trust agreement be construed to transfer an interest to the sons only at the grantor's death, it was a transfer which New Jersey could not tax.

The determination by the New Jersey courts of the kind of interest transferred and the time when it was effected is a matter of local law binding on us. *Orr* v. *Gilman*, 183 U. S. 278, 285; *Chanler* v. *Kelsey*, 205 U. S. 466, 476; *Nickel* v. *Cole*, 256 U. S. 222, 225-226; *Saltonstall* v. *Saltonstall*, 276 U. S. 260, 270. There is no constitutional reason why a state may not make the transfer *inter vivos* the taxable event and then measure the tax by the value of the property at time of death. *Keenan* v. *New York*, 222 U. S. 25. Cf. *Milliken* v. *United States*, 283 U. S. 15, 20, 22, 23; *Helvering* v. *Hallock*, 309 U. S. 106, 111; Paul, Federal Estate and Gift Taxation (1942) § 2.13. A state which may tax the disposition of property made by one of its domiciliaries certainly may make the payment of the tax conditional on his being domiciled in the state at his death, and may delay payment until then. The

fact that the taxable event and the tax levy are widely separated in time is quite irrelevant. In short, "The due process clause places no restriction on a State as to the time at which an inheritance tax shall be levied or the property valued for purposes of such tax." *Salomon* v. *State Tax Commission*, 278 U. S. 484, 490. And if the transfer to the sons is assumed to have taken place only at the time of the grantor's death, there is no constitutional reason why the result need be different. The fact that he did not then "own" the property is inconsequential. Cf. *Whitney* v. *State Tax Commission*, 309 U. S. 530. The significant facts are that the rights of the remaindermen derived solely from the trust agreement and that the grantor died domiciled in New Jersey.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.